U.S. Department of Labor Office of Administrative Law Judges
Washington, DC

In the Matter of

Terry Miller and Demora Rernett
v. Hepburn Orchards, Inc.
(,J.S. Case No. 4630-83-37);

Ricky Snow : Case No. 85-JSA-2
v. Hepburn Orchards, Inc. Case No. 85-JSA-2
(J.S. Case No. 4630-83-64);

Domingo Diaz
v. Hepburn Orchards, Inc.
(J.S. Case No. 463O-S3-51);

Merilus Senat and Oldvert Ulysse:
v. Hepburn Orchards, Inc.
(J.S. Case No. 4630-83-63).

DECISION AND ORDER

This matter arises under the provisions of the Immigration and Nationality Act, 8 U.S.C. 1101 et seq (the Act), which regulates the admission of aliens into the United States, and regulation governing the administration of the Act, 20 CFR Part 655.

Statement of Facts

Hepburn orchards, Incorporated is a fruit grower located in Maryland, which qualified under 20 CFR Part 655 to hire temporary foreign workers under a temporary labor certification issued by the Secretary of Labor. In 19S3, it hired Jamaican workers for the harvest season beginning in July and running through November.

After obtaining the appropriate clearance order for the recruitment of foreign workers, Hepburn placed its request for workers with the Washington County Fruit Growers Association (Washington) which assisted member-growers in filling job orders. This association employed an agent, Florida Fruit and Vegetable 9ssociation (Florida) acting in cooperation with the West Indies Labor Pool, and, in this case, the government of Jamaica, entered into contracts of employment on behalf of Hepburn which included as parties Hepburn, the worker, and the government of Jamaica.

Florida is a labor broker for employers from farm labor throughout the United States. It sends or has an on-site agents for recruitment of temporary workers in the West Indies. It selects workers based on their ability to harvest sugar cane. When the worker is hired, Florida enters into a contract as agent for the employer, and it arranges transportation to the place of employment. For these services, it is paid a fee out of the wages earned by the employee.

The contract of employment is a lengthy, formal agreement which covers wages, and living conditions, which must be provided by the employer. It incorporates governmental regulations which govern all phases of the employer-employee relation. When the worker is hired, the contract is executed in Jamaica by the worker, representatives of the employer, and the government.

The period of employment of the worker begins when he arrives at the place of employment, and it terminates on the date of his departure from that place. The term of employment is fixed, but it may be shortened provided the employer pays a guaranteed minimum to the employee for the season. The employer may terminate the workers employment for cause: deportation, or failure to meet minimum production standards. The contract contains a brief description of the work, and states that the worker must be able to use wood or aluminum ladders up to 24 feet, climb, and carry bags of fruit weighing from forty to fifty pounds. Other conditions provide: "The employer will provide three (3) three days of training or allow (3) days of work from the commencement of employment, at the conclusion of which workers must have reached production standards".

In its hiring for the fall of 1983, Hepburn entered into contracts with about eighty Jamaican workers for the season. In preparation for that harvest season, Hepburn also received applications for employment from U.S. workers. More than half of these applicants were denied employment on their failure of Hepburn's "ladder test". Among the rejected employees were the complainants in this action.

The practice of employing alien workers cannot be used to exclude qualified U.S. workers. The laws and regulations require domestic and foreign workers to be treated equally. At the time Hepburn took on the aliens, the complainants in this case applied for work at Hepburn, but were refused employment. They complain that they were required to demonstrate skills not required of the aliens as a condition of employment. Moreover, they contend that they were refused employment upon failing the "ladder test" whereas the aliens were given three days of training to learn to manage the ladder.

The employer denies these allegations and says that all prospective employees were required to pass the "ladder test," and that the three days of training was used to increase the production of the workers after they were hired rather than to teach ladder handling.

The ladder test was administered exclusively by Mr. Terry Hepburn, vice president of Hepburn Orchards as a condition for employment for all applicants in 1983. State Transcript at 91, and 115. Unless an applicant had previously worked for Hepburn picking apples, that person would have to take and pass the ladder test id. at 92. Several U.S. workers failed the test, but no

West Indian workers failed the test in 1983. id.

The ladder test is described by Mr. Hepburn:

> We ask applicants to vertically stand the ladder and be able to walk with it a reasonable distance which is, you know, like three or four trips (sic).

Transcript at 116. The length of the ladder ranges between 21 and 24 feet, but there is no uniformity in the kind or size of the ladder: "It depends, like I said again, who broke what and what was available right next door". Transcript at 116.

Statement of Proceedings

The complainants, who are U.S. workers filed complaints alleging that Hepburn violated 20 CFR Part 655 in requiring the ladder test of U.S. workers and not Jamaican workers, and in giving Jamaicans three days training, but not offering the same to U.S. workers.

The Job Service local office consider the complainants and found no violations. On appeal the State Office found no violations. On request of the complaints, the State Board of Appeals conducted a hearing at which both sides produced evidence. The State Board Special Examiner found violations of Section 20 CFR 656.202(a) of the regulations and ordered Hepburn's job services discontinued.

The regional administrator of U.S. Department of Labor reviewed the case, and affirmed the Special Examiner in the findings and penalty. The decision of the regional administrator is on appeal to the office of administrative law judges. The case is considered on all of the evidence presented by the parties below, and the briefs submitted on this appeal..-4-

Issues

The appellant, charges that the Regional Administrator erred in his findings and decision. On appeal, Hepburn states the issues as follows:

A. The ladder test administered by Hepburn in 1983 was a necessary component of the clearance order and had been approved by DOL.

B. Hepburn's administration of the ladder test in 1983 did not violate 20 CFR 655.202(a) as it was administered to all workers as a pre-employment condition.

C. The three day training period is a post-employment period provided to all workers.

D. Hepburn did not violate the 50 percent rule in 1983.

Conclusions

A. The ladder test administered by Hepburn in 1983 was a necessary component of the clearance order and had been approved by DOL.

Hepburn argues that the ladder test was administered in accordance with the clearance order and the job offer for alien employment.

This conclusion is not supported by the evidence. While it is true that the job description in the order and offer in 1983 contains a statement that the worker would be required to handle ladders up to 24 feet, there is no mention that the applicant would be required to demonstrate an ability to handle a ladder as a condition of hire. The inference drawn by Hepburn that the ladder test was a necessary component is not an inference that flows from the job description.

The Jamaicans were hired on the basis of their ability to cut sugar cane. They had an executory contract with Hepburn before they left Jamaica. There was nothing expressed or implied in that contract requiring the aliens to take the "ladder test" in Maryland, or that failure of a ladder test would be grounds for repatriation. The contract made in Jamaica may be reasonably interpreted to mean that the aliens were hired by Hepburn and that they would be given training on the job to meet production standards. That the Jamaican government would permit its nationals to go to Hepburn subject to a ladder test without assurances of work is inconceivable.

The employer argues that the ladder test was approved by the Department of Labor. This is a generalization taken out of context and it is irrelevant to the question for determination: Were the aliens and U.S. workers treated equally in the matter of the ladder test? The answer is no, and specifically it is found that the ladder test was not a component of the clearance order.

B. Hepburns administration 0f the ladder test in 1983 did not violate 20 CFR 655.202(a) as it was administered to all workers a preemployment condition.

Section 20 CFR 655.202(a) provides in part:

> (a) so that the employment of aliens will not adversely affect the wages and working conditions of similarity employed U.S. workers, each employer's job offer to U.S. workers must offer U.S. workers at least the same benefits which the employer is offering, intends to offer, or will afford, to temporary foreign workers. Conversely, no job offer may impose on U.S. workers any restrictions or obligations which will not be imposed on the employer's foreign workers.

As shown above, the foreign workers had assurance of work before they left Jamaica. Whether or not they passed a ladder test in Maryland was not a condition of their employment. Contrary to Hepburn's testimony, it is believed that the aliens were not given a ladder test after they arrived in Maryland. Indeed, if they were given any tests in Maryland, Hepburn was violating the contract made by his agent with the alien and the government of Jamaica: the alien was judged and qualified for work with Hepburn on his ability to cut sugar cane in Jamaica.

The ladder test which Hepburn represents as an objective criterion for screening applicants for work is suspect. In the context of this case, it is seen as a device for the arbitrary rejection of job applicants. The results of the test are as predictable as Hepburn wishes to make them. It is noted: that he alone gives the test; that the choice of ladders is his: that the location, duration, and course for the test is selected by Hepburn. Ladder handling ability in this instance is directly affected by the weight and length of the ladder, and the topography of the land over which it must be carried. It is seen from Hepburn's testimony that there is no standard.-6- for testing: the ladder is one that was "available", and the distance was "like three or four trips". Transcript at 116. Given these variables, the test is as easy or difficult as Hepburn wishes to make it. It is not surprising, therefore, that he reported that none of the Jamaicans failed the test. Hepburn had considerable discretion in giving the test, and there is a strong inference based on the numbers, that Hepburn used it to reject U.S. workers, and, in contrast to his handling of the Jamaicans, he did not allow them a three day training period.

It is found that Hepburn violated 20 CFR 655.202(a) by imposing restrictions on U.S. workers not imposed on foreign workers, and in failing to offer training (the same benefits) to U.S. workers that it offer to foreign workers.

C. The three day training period is a post-employment period provided to all workers.

Hepburn's contract with the foreign workers contained a provision for a three day training period. Through his agent, he hired them, and then trained them. The training period was an enforceable term of that contract. Indeed, failure to provide the foreign workers with training would breach the agreement not only with the worker but the government as well. In the context of hiring process, the training period is viewed as an inducement to work for Hepburn. Conceivably, workers who could not handle the ladder in the beginning could acquire that skill with training. A foreign worker, who was in doubt about his skills for the job, could rely on his training to bring him up to production.

The employers argument that the training period only applies after hire is a truth, which does not meet the issue. The point here is that the foreign workers were hired, and as a provision of their contracts they were assured a training period. For equality of treatment, the U.S. worker should have been hired and given the same assurances.

It is found that Hepburn did not offer the benefits of training that it offered to foreign workers.

D. Hepburn did not violate the 50 percent rule.

Section 20 CFR 655.203(e) provides in part:

> From the time the foreign workers depart for the employers place of employment, the employer will provide employment to any qualified U.S. worker who applies to the employer until fifty percent of the period of the work contract,

under which the foreign worker who is in the job was hired, has elapsed.

The facts are not in dispute, Hepburn did not hire U.S. workers as mandated by this section. The reasoning is that since the U.S. workers did not pass the ladder test, Hepburn was not obligated to hire them. This is circumlocution that presumes that the U.S. workers and the foreign workers were getting the same deal from Hepburn. Conditions were not the same for both sets of workers. The foreign workers were hired, and then trained, whereas the U.S. workers were rejected without an offer of training.

It is found that Hepburn violated 20 CFR 655.203(e).

ORDER

For the reasons stated above, it is decided that Hepburn Orchards Incorporated violated the terms of its temporary labor certification for 1983, and, accordingly, pursuant to 20 CFR 655.209(a) Hepburn Orchards, Incorporated, shall not be eligible to apply for a temporary labor certification for the coming year.

This order affirms the decisions of the Special Examiner and the Regional Administrator: "...that all Job Service services to Hepburn Orchards, Inc. be terminated within twenty (20) working days from the certified date of the receipt of this decision.

Entered: June 5, 1986

GEORGE A. FATH
Administrative Law Judge

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